IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-885

UNITED STATES OF AMERICA; GEORGE P. SCHULTZ, Secretary of the Treasury; S. S. SOKOL, Commissioner of Accounts,

Petitioners,

—v.—

WILLIAM B. RICHARDSON,

Respondent.

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Opinions Below

The opinion of the court of appeals (Pet. App. A, pp. 1a-53a) is reported at 465 F.2d 844. The opinion and order of the district court (Pet. App. B, pp. 55a-58a) are unreported.

Jurisdiction

The judgment of the court of appeals was entered on July 20, 1972. On October 11, 1972, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including December 17, 1972, and the petition was filed on December 15, 1972. This Court granted the petition on February 26, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Question Presented

Whether a person has standing in his capacity as a federal taxpayer to challenge the provisions of the Central Intelligence Agency Act which provide that appropriations to and expenditures by that Agency shall not be made public, on the ground that such secrecy contravenes Article I, Section 9, clause 7 of the Constitution, which generally provides for the publication of statements of expenditures of public money.

Constitutional and Statutory Provisions Involved

Article I, Section 9, clause 7 of the Constitution provides as follows:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

31 U.S.C. 1029 provides as follows:

> It shall be the duty of the Secretary of the Treasury annually to lay before Congress, on the first day of the regular session thereof, an accurate combined statement of the receipts and expenditures during the last preceding fiscal year of all public moneys, including those of the Post Office Department, designating the amount of the receipts, whenever practicable, by ports, districts, and States, and the expenditures by each separate head of appropriation.

The Central Intelligence Agency Act, 50 U.S.C. 403 *et seq.*, provides in pertinent part:

50 U.S.C. 403f(a):

> In the performance of its functions, the Central Intelligence Agency is authorized to—
>
> Transfer to and receive from other Government agencies such sums as may be approved by the Office of Management and Budget, for the performance of any of the functions or activities authorized under sections 403 and 405 of this title, and any other Government agency is authorized to transfer to or receive from the Agency such sums without regard to any provisions of law limiting or prohibiting transfers between appropriations. Sums transferred to the Agency in accordance with this paragraph may be expended for the purposes and under the authority of sections 403a to 403c, 403e to 403h, and 403j of this title without regard to limitations of appropriations from which transferred; • • •

50 U.S.C. 403j(b):

> The sums made available to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds; and for objects of a confidential, extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount therein certified.

Statement

Respondent accepts the Statement in the brief for petitioners as substantially correct.

Summary of Argument

The doctrine of standing, as it has been developed by this Court has two aspects: "constitutional" standing required by the "case and controversy" provisions of the Constitution (Article III, section 2) and "discretionary" standing established as a matter of judicial self-restraint by this Court in order to avoid undue burden and to insure the proper presentation of issues. See *Data Processing Service* v. *Camp*, 397 U.S. 150 at 154.[1] Here plaintiff-respondent (hereafter designated simply as plaintiff) qualifies under both heads.

First, there is a clear Article III "case and controversy" with regard to the meaning and application of Article I, section 9 clause 7 of the Constitution and its impact on the statute which purports to exempt the CIA from the obligation of this provision of the Constitution, 50 U.S.C. 403j(b). The issue is being pressed in an adversary context because plaintiff has been refused information with regard to the expenditures by the CIA in reliance upon this statute.

Second, the self-imposed "discretionary" restraints should not be exercised here since the adversary posture

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[1] The dual nature of standing is discussed in Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 225, 302-303 (1961); Davis, *Standing to Challenge Governmental Action*, 39 Minn. L. Rev. 353, 386-391 (1955). See generally, Hearings on S. 2097 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 89th Cong. 2d Sess. 465, 467-468 (1966).

of the case and substantial interest of the plaintiff satisfies the most traditional notions of standing and, if the plaintiff is denied standing, there is no other person in a better position to raise the issue. That issue can be very simply framed: Can a citizen-taxpayer challenge a statute which, on its face, violates an express command of the Constitution intended to give to him and all other citizens the right to know how their government is spending its tax revenues?

ARGUMENT

I.

Plaintiff Has Met the Jurisdictional Requirement for Standing.

The first modern case to deal squarely with the question of standing in its constitutional aspect is *Baker* v. *Carr*, 369 U.S. 186 (1962). There the Court noted at page 204 that this requirement is met where there is "concrete adverseness which sharpens the presentation of issues." This was developed in *Flast* v. *Cohen*, 392 U.S. 83, 101 (1968), where it was said: "in terms of Article III limitations the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form capable of judicial resolution." This was followed in *Data Processing*, 397 U.S. at 152. See also *Barlow* v. *Collins*, 397 U.S. 159, 164; *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45; *Eisenstadt* v. *Baird*, 405 U.S. 438, 443ff; *United States* v. *SCRAP*, 41 U.S.L.W. 4866 (June 18, 1973).

There can be no doubt that the constitutional requirements for standing are met in this case. The controversy is a concrete one and narrowly framed. Plaintiff claims that he cannot obtain from the Secretary of the Treasury a statement and account of the receipt and expenditures of the Central Intelligence Agency (App. 4-5). He cannot obtain this information because sections 403f(a) and j(b) of Title 50, U.S.C. remove from the Secretary the duty, otherwise imposed by statute [31 U.S.C. 1029], to provide the Congress annually with an "accurate combined statement of the receipts and expenditures during the last preceding fiscal year of all public moneys . . ." expended by the Central Intelligence Agency. The statement from which CIA expenditures are omitted is periodically published and available to taxpayers and citizens, including the plaintiff.

Plaintiff claims that the relevant sections of the Central Intelligence Agency Act violate his constitutional right, specifically granted to him by Article I, Section 9, Clause 7, to "a regular Statement and Account of the Receipts and Expenditures of all public Money . . ." and that he is thereby harmed in precisely the interest which the Clause is intended to protect. This substantial dispute, in which the parties are clearly adverse, is framed in a form traditionally capable of judicial resolution. Accordingly, the plaintiff and defendants herein are enmeshed in a classic "case and controversy" falling within the province of the judiciary.

II.

Plaintiff Has Met the Discretionary Requirements for Standing.

In addition to the minimum requirements of Article III standing, this Court has enunciated a rule of judicial self restraint which relieves the judiciary from expending judicial resources in the absence of an adversary proceeding in which the parties possess a "substantial" or "concrete" stake.

In *Data Processing*, 397 U.S. at 153 the Court described what it later called its "rule of self-restraint" (*id.* at 154) as "whenever the interest sought to be protected by the complainant is arguably within the zone of interests to be protected by the statute or constitutional guarantee in question." That requirement has been variously applied, depending largely on the particular circumstances of the case. Thus in *Flast, supra*, the taxpayer was held to have met this requirement because he was challenging the use to which his tax moneys were being put. But in *Abingdon School District* v. *Schempp*, 374 U.S. 203 (1963) it was held that a spiritual stake in First Amendment values was sufficient. In *Baker, supra*, and the many cases which have followed it, voters were given standing because the various apportionments they were challenging had the effect of diminishing the impact of their votes. In none of these cases was standing denied because of the relatively minor impact on the particular plaintiff.[2]

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[2] In *United States* v. *SCRAP, supra*, Mr. Justice Stewart noted the nature of the stake which this court has recognized as sufficient to confer standing when he quoted Professor Davis' formulation of standing with approval:

> The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a ques-

It is noteworthy that in all these cases the challenged action could not have been questioned at all had not persons situated as were the respective challengers been allowed standing. Obviously that is the situation here. This Court has recognized the force of this argument in other situations.

In *Barrows* v. *Jackson*, 346 U.S. 249 (1953) the Court held that a white party to a restrictive covenant had standing to challenge its validity as discriminatory against Negroes, since otherwise the validity might not be able to be tested at all, citing *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) and other cases at page 257.

In *NAACP* v. *Alabama*, 357 U.S. 449 (1958) the Court allowed an organization to raise a constitutional issue on behalf of its members.

In *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963) the Court discussed the standing of a book publisher to challenge restrictions on book sellers, saying in note 6 on page 65: "Unless he is permitted to sue, infringements of freedom of the press may too often go unremedied."

Standing, indeed, has been denied in recent decisions of this Court only when it was evident that someone other than the litigating party could raise the constitutional issue. See *Sierra Club* v. *Morton*, 405 U.S. 727 (1972); *Linda*

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tion of principle; the trifle is the basis for standing and the principle supplies the motivation. *United States* v. *SCRAP supra* at n. 14, quoting from Davis, *Standing: Taxpayers and Others*, 35 U. of Chi. L. Rev. 601, 613 (1968).

Of course, plaintiff's interest in obtaining information concerning the receipts and expenditures of the CIA is far more important to the functioning of the democratic process than the "identifiable trifles" discussed by Professor Davis.

R.S. v. *Richard D.*, 41 U.S.L.W. 4371 (March 5, 1973); and *Laird* v. *Tatum*, 408 U.S. 1 (1972).

In all those cases there were persons other than those before the court who could have raised the issues. Here, of course, that is not so.

Plaintiff has an interest, both as citizen-voter and as taxpayer, in knowing how CIA money was spent and if it was spent legally. Until the Secretary of the Treasury is required to file a Statement and Account of CIA expenditures, however, there will be no way to determine whether the CIA is acting pursuant to its statutory authority.

While the dissent and the majority below agreed that the right conferred by the Statement and Account Clause runs to the public, the dissent concluded that "the right asserted [is] not a paramount one," 465 F.2d 872. But all constitutional rights are important, and it is difficult to imagine a more fundamental right than that of a citizen and taxpayer to know and evaluate the spending policies of his government.

The government argues essentially that the plaintiff's injury is not sufficiently individualized for him to satisfy the standing requirements. Under this view if the government refuses to divulge its expenditures to only a particular group of citizens, they would have standing to sue; but if it infringes the constitutional rights of all taxpayers and citizens, they do not have standing.

This position was explicitly rejected by the Court in its decision this Term in *United States* v. *SCRAP*, *supra*. In *SCRAP* two environmental organizations had sued the Interstate Commerce Commission to enjoin certain increases in freight rates granted to the nation's railroads, on the

ground that the increases would discourage the use of recyclable materials and thereby have an adverse impact on the environment of the nation. In holding that the environmental organizations had standing to sue despite the fact that the injury they had alleged was extremely attenuated and shared equally by all members of the public, the Court pointed out that:

> . . . standing is not to be denied simply because many people suffer the same injury . . . . To deny standing to persons who are in fact injured simply because many others are also injured would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion. 41 U.S.L.W. at 4871.

Mr. Justice Stewart, writing for the majority went on to point out in a footnote that the degree of injury sufficient to give the plaintiff a personal stake in the controversy is minimal, especially in a case where all members of the public are equally affected by the challenged activity:

> The Government urges us to limit standing to those who have been "significantly" affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. 41 U.S.L.W. at 4872 n. 14.[3]

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[3] To illustrate how minimal the plaintiff's injury might be, Mr. Justice Stewart pointed to several landmark decisions of this Court:

> We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, see *Baker* v. *Carr*, 369 U.S. 186; a five dollar fine and costs, see *McGowan* v. *Maryland*, 366 U.S. 420; and a $1.50 poll tax, *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663. . . .

III.

Plaintiff Also Meets the Requirements for Taxpayer Standing to Seek Judicial Enforcement of Specific Constitutional Requirements for the Exercise of the Taxing and Spending Power.

In *Flast* v. *Cohen*, 392 U.S. 83 (1968) this Court considered the question whether a taxpayer had standing to attack a federal statute on the ground that it violated the Establishment and Free Exercise Clauses of the First Amendment. The Court held that, as a matter of sound judicial policy, the taxpayer was an appropriate party to invoke federal judicial power because there was "a logical nexus between the status asserted and the claim sought to be adjudicated." 392 U.S. at 102. The nexus required for taxpayer's standing has two aspects to it:

> . . . First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, section 8 of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute . . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, section 8 . . . . 392 U.S. at 102-103.

As the majority below correctly recognized, the plaintiff in this case meets the two-prong test established in *Flast*: "(1) the plaintiff [has established] a nexus between his status as a taxpayer and the challenged Government activity to give him a personal stake in the action; and (2) his claim [relates] to a specific constitutional prohibition so that the issues may be focused sufficiently for proper judicial resolution." 465 F.2d at 851-52.

There is a logical link between plaintiff's status as a taxpayer and a statute which deprives him of fiscal information that the Constitution obligates the government to publish for his information and benefit. The Government argues, however, that *Flast* must be limited to challenges to appropriations, and that because plaintiff directly challenges the "procedures followed in appropriating and reporting expenditures, not . . . the constitutionality of the expenditures themselves," he cannot maintain standing to pursue his claim (Gov't Brief, at 9-10). This is an inadmissible distinction. It is the intimacy of the constitutional provision to the spending process that is relevant, not whether the limitation on the government is procedural or substantive.

If Congress undertakes to tax or spend pursuant to procedures which violate the conditions imposed by the Constitution, the defect is surely no less fundamental and the interest of the taxpayer no less vital than when funds are appropriated for a forbidden purpose. Suppose, for example, that the program in *Flast* had been defective because the President had failed to sign the enabling Act or because the bill appropriating funds for its administration had not originated in the House of Representatives. It would be anomalous to hold that such a fatal flaw was beyond correction but that the federal taxpayer might liti-

gate the much more elusive question of whether expenditures made pursuant to the program resulted in an undue involvement of church and state.

The *Flast* challenge, it must be remembered, was brought in the face of *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), which had "stood for 45 years as an impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interests of federal taxpayers" 392 U.S. at 85. The taxpayer in *Frothingham* had challenged federal grants to the states made pursuant to the Maternity Act of 1921, on the grounds that they violated the Fifth and Tenth Amendments to the Constitution. The Supreme Court held that the taxpayer had no standing to press her challenge because she did not rely on any specific limitation on the taxing and spending power of Congress. As the court observed in *Flast*, "The Due Process Clause of the Fifth Amendment does not protect taxpayers against increases in tax liability" (392 U.S. at 105); while the Tenth Amendment protects only "the states' interest in their legislative prerogatives," and has nothing to do with taxpayers (392 U.S. at 105). Granting standing under these circumstances, therefore, might have opened up the federal courts to similarly "generalized grievances" of many other disgruntled taxpayers.

The plaintiff in this case, on the other hand, satisfies the two-part test enunciated in *Flast* which serves to protect the interests in sound judicial administration which concerned the Court in *Frothingham*. First, he is challenging the constitutionality of enactments by which Congress has sought to alter the conditions governing the expenditure of public money. By definition, this is a matter integrally

related to the taxing and spending power. Second, the basis of his challenge to these enactments is that they offend a specific constitutional limitation—one which unqualifiedly requires that public money shall not be expended without a public accounting.

IV.

While the Merits of Plaintiff's Challenge Are Not Now Before the Court, the Statement and Account Clause on Its Face Was Intended to Protect the Interests Plaintiff Is Asserting.

The government Brief, pp. 25-28 tries to denigrate this case by suggesting that the constitutional provision relied on is really not important and that, in any case, it was not intended to restrict the Congress. Plaintiff submits this is an indirect way of dealing with the merits of this case, which are not properly before the Court at this time. In any case, all that is necessary to establish standing is to show that the claim made is "arguably within the zone of interest to be protected . . . by the . . . constitutional guarantee in question." *Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. at 153. Some further observations about the history of Article I, section 9, clause 7 than is given in the government's brief are therefore appropriate.

During the Maryland debates on the Constitution, James McHenry spoke in favor of the constitutional provision at issue with these words: "The people who give their money ought to know in what manner it is expended." 3 Farrand, *The Records of the Federal Convention of 1787*, 150 (Rev. ed., 1966). From the very beginnings of the

Republic this duty has been generally recognized:[4] it was included in the Constitution itself and the constitutional provision at issue is presently implemented by 31 U.S.C. 1029.

At the Constitutional Convention, George Mason moved to require an annual account of public expenditures. Madison proposed to amend this motion to allow publication "from time to time," but only because it was believed that requiring publication at fixed intervals could lead to no publication at all, as had become the practice under the Articles of Confederation: "a punctual compliance being often impossible, the practice had ceased altogether." 2 Farrand, *The Records of the Federal Convention of 1787*; at 619.

During the Virginia debates on the Constitution, Mason expressed his belief that while some matters might require secrecy, ". . . he did not conceive that the receipts and expenditures of public money ought ever to be concealed. The people, he affirmed, had a right to know the expenditures of their money." 3 *Elliot's Debates on the Federal Constitution* at 459.[5] When Mason voiced his concern that

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[4] By the second session of the 1st Congress, the Treasurer of the United States was providing quarterly accounts of public expenditures. 1 Annals of Congress 1031, 1061, 1141. As early as 1791, the House provided by resolution (2 Annals of Congress 302):

> RESOLVED: that it shall be the duty of the Secretary of the Treasury to lay before the House of Representatives . . . an accurate statement and account of the receipts and expenditures of all public moneys . . . in which statement shall also be distinguished the expenditures which fall under each head of appropriation, and shall show the sums, if any, which remain unexpended, and to be accounted for the next statement of each and every of such appropriations.

[5] Mason appears to have suggested, for example, that the details of diplomatic negotiations or military operations might be kept secret—at least while they were ongoing.

the requirement of publication from "time to time" might be too "loose," Lee replied that Mason's concern with the wording was "trivial"—that "[i]t must be supposed to mean, in the common acceptance of language, short, convenient periods"; and that "[t]hose who would neglect this provision would disobey the most pointed directions." 3 Elliot *supra*, at 459. Madison added that the purpose of allowing an accounting from "time to time" (rather than in short, prescribed periods) was to insure that the accounts would be ". . . more full and satisfactory *to the public*, and would be sufficiently frequent." 3 Elliot *supra*, at 460 (emphasis added). Madison's concern was clearly that more rather than less comprehensive reports be provided, contrary to the assertions of the government in its brief (pp. 24-25) and if he disagreed with Mason, it was solely over how to implement this goal.[8]

Furthermore, the text itself of the Statement and Account clause refutes the government's contention that the clause "allows Congress to decide how much of the reports from the Executive should be made public" (Gov't Brief at 23). The clause unequivocally states that "a regular

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[8] A letter from Madison to Edmund Pendleton on February 23, 1793 evidenced Madison's concern with irregularity and secrecy "in the administration of the Treasury Department." Hunt, *The Writings of James Madison*, Vol. VI, 123-25 (1906).

Patrick Henry's comment, that under the proposed language ". . . the national wealth is to be disposed of under a veil of secrecy; for [with] the publication from time to time . . . they may conceal what they may think requires secrecy," was *not* intended to approve of such a practice nor to suggest that the clause permitted it. Rather, and significantly, Henry disagreed with the phrase, "from time to time" not because it allowed Congress to "conceal what they think requires secrecy" but because the language allowed for *abuse* of the clear mandate and intent of the clause to require disclosure and prevent secrecy. 3 Elliot at 462. Gov't Brief, at 24.

statement and Account of the Receipts and Expenditures of *all* public Money *shall* be published from time to time" (emphasis added). By contrast, the Framers also wrote a constitutional provision which requires each House to maintain and publish a journal of proceedings, but excepts from the requirement of publication "such facts as *may in their Judgment* require Secrecy." Article I, section 5, Clause 3 (emphasis added). The difference between the provision calling for publication in the journal of proceedings and the provision directing publication by the Executive of all receipts and expenditures reflects Mason's view that while secrecy may sometimes be warranted, it is never warranted in the accounting of public money.[7]

In sum, the express constitutional command that a statement and account of the receipts and expenditures of all public money shall be published was anything but inadvertent. Indeed, the interests plaintiff asserts are not merely within the zone of interests sought to be protected by Article I, Section 9, clause 7 of the Constitution—they are the central interests which the Statement and Account clause was designed to protect.[8]

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[7] The Circuit Court majority found that the intent behind the Clause was that ". . . the citizenry should receive some form of accounting from the government. The use of the word 'published' emphasized their intention." 465 F.2d 850. The dissent fully agreed that the duty imposed ran to the public.

[8] The government's statement of the relevant history (Gov't Brief at 23-25) is both misleading and incomplete. The brief omits the following sentence in the quotation (p. 24) attributed to Mason after the word "concealed": "The people, he affirmed, had a right to know the expenditures of this money" (3 Farrand, 326; 3 Elliot Debates, 2d ed., 1836, 423). And Madison remarked that what should be published should include "all receipts and expenditures of public money. . . . This is a security which we do not enjoy under the existing system" (3 Farrand at 326). In the Elliot version (Vol. 3, p. 424) Madison is quoted as saying, "This pro-

V.

It Is Essential to Grant Plaintiff Standing in This Case in the Absence of Any Party Better Situated to Litigate His Important Constitutional Claim, Which Will Otherwise Be Forever Insulated From Judicial Scrutiny.

If standing is denied to the plaintiff in this case, the Court will have denied to every citizen and taxpayer the right to seek judicial enforcement of a constitutional provision that was specifically designed for their benefit and which is presently being violated.

It would be inconsistent with the obligations of this Court under Article III of the Constitution flatly to deny to all citizens the right to litigate a constitutional provision which the Framers considered "vital" for their protection. Mr. Chief Justice Marshall emphasized this point more than a century and a half ago:

> It is most true that this Court will not take jurisdiction if it should not; but it is equally true, that it must

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vision went further than the Constitution of any state in the union, or perhaps in the world." And Richard Henry Lee of Virginia warned: "Those who would neglect this provision, would disobey the most pointed directions" (3 Elliot 423).

In New York, Chancellor Livingston reminded his hearers on June 27, 1788 "to keep in mind, as an important idea, that the accounts of the general government are 'from time to time' to be submitted to the public inspection . . . Will not the representatives consider it as essential to their popularity, to gratify their constituents with full and frequent statements of the public accounts. There can be no doubt of it" (2 Elliot 329).

The argument that Mason's view was rejected by the Convention is not supported by the circumstance that the reports could be made "from time to time" instead of annually and, as we have seen, Madison who proposed this change does not appear so to have viewed it.

take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do, is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one. *Cohen* v. *Virginia*, 19 U.S. 264, 404, 6 Wheat. 291 (1821).

Both the majority and dissenting opinions below recognized that if standing were not granted to the plaintiff, the constitutional provision at issue could be violated with impunity and the violation never subjected to judicial review. Nevertheless, the dissent argued, courts have previously declined to grant standing even in the face of this objection. But the cases cited in support of this proposition can readily be distinguished from the instant case on other grounds, and in none of them did the Court close its doors forever to a concretely framed petition for the redress of a constitutional injury.

In *Sierra Club* v. *Morton, supra,* there were obviously "better" plaintiffs available to bring the action, and the

plaintiff there had claimed no injury to itself. In *Frothingham* v. *Mellon, supra,* the plaintiff did not claim an injury to a specifically protected constitutional interest of her own, nor could she personally claim more than an infinitesimal financial injury. Similarly, the circumstances in *Fairchild* v. *Hughes,* 208 U.S. 126 (1921), evinced a recognition from the Court that there were better parties to litigate the issue at hand than the citizen-plaintiffs. *Ex Parte Levitt,* 302 U.S. 633 (1937), on the other hand, involved a plaintiff who could show no direct, personal injury, and the constitutional provision invoked by him was not one which was specifically intended to grant rights to the public. Related difficulties existed in *Laird* v. *Tatum, supra,* where the Court determined that the plaintiffs had suffered no present injury and their claim was therefore not justiciable. The five-justice majority in *Laird* was also careful to point out that it would certainly protect the constitutional interests asserted when and if a direct and immediate violation of those interests could be demonstrated.

Nor have the lower federal courts denied standing to a plaintiff under circumstances similar to those in this case. In *Velvel* v. *Nixon,* 415 F.2d 236 (10th Cir. 1969), the plaintiff sought a declaration that the conflict in Vietnam was unconstitutional since war had not been declared by Congress. But plaintiff in that case, a professor of constitutional law beyond draft age, had no specific interest in the issue, whereas respondent citizen and taxpayer in the instant case has the specific interest in knowing what his government has done and is doing with the money raised by taxation so that he can exercise his functions as elector.

Pietsch v. *President of the United States,* 434 F.2d 861 (2d Cir. 1970), sought an injunction against collection of

an income tax surcharge and a declaration that the Vietnam conflict was unconstitutional. The Court of Appeals upheld the dismissal of the complaint for failure to allege expenditures in violation of a specific constitutional prohibition. But in the case at bar plaintiff does challenge expenditures made in direct violation of the constitutional command that there be a public accounting.

Lamm v. *Volpe*, 449 F.2d 1202 (10th Cir. 1971) sought to challenge a statute controlling outdoor advertising. Plaintiff purported to act on behalf of residents of Colorado, but had no interest affected by the challenged regulation and could not point to a specific constitutional prohibition.

It is difficult to understand the government's reliance on *Essex County Welfare Board* v. *Cohen*, 299 F. Supp. 176 (D.N.J. 1969). There the court held that a state welfare board had standing to seek relief for welfare recipients and that the mothers of children receiving aid also had standing. It denied standing only to the director of the board suing as taxpayer because his challenge to the law did not rest on his status as taxpayer.

Finally, the government relies on the decision in an early case brought by respondent, *Richardson* v. *Kennedy*, 313 F. Supp. 1282 (W.D.Pa. 1970), which challenged statutory pay increases of federal employees on the ground that the law granting them violated the separation of powers. But there the decision rested on the District Court's conclusion that the challenged expenditure did not stem from the taxing power and, therefore, plaintiff could not establish standing within *Flast*.

Not one of these cases touches on the standing of a citizen-taxpayer to challenge a violation of a direct command of the Constitution enacted for the benefit of all members of the public so that they should be properly informed of the expenditures of their government.

The constitutional and policy considerations underlying the doctrine of standing "do not insulate executive action from judicial review, nor [should they] prevent any public interests from being protected through the judicial process." *Sierra Club* v. *Morton*, 405 U.S. at 740. In short, they must not bar substantial constitutional claims from ever being heard, but should serve to insure that constitutional questions will be presented in a form most amenable to judicial resolution.

Here there is no reason to deny or postpone judicial consideration of plaintiff's claim. Plaintiff is presenting the court with a genuine dispute in an adversary context and in a form clearly capable of judicial resolution. He is claiming a continuing and direct injury to his interests as a taxpayer and citizen that are, at least arguably, "within the zone of interests" intended to be protected by the Statement and Account Clause (*Data Processing Organizations, Inc.* v. *Camp*, 397 U.S. at 153); there is every assurance that plaintiff will pursue his claim vigorously and will "adequately represent the interests he asserts" (*Sierra Club* v. *Morton*, 405 U.S. at 758 (Blackmun, J., dissenting)); and there is no suggestion or likelihood that some other party would be better suited or situated to bring this claim. (*Id.*, 405 U.S. at 734-35.)

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed, and the case remanded to the district court with instructions to take appropriate steps to designate a statutory three-judge court for adjudicating the merits of plaintiff's complaint.

Respectfully submitted,

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